

STATE OF MICHIGAN
COURT OF APPEALS

MCDONALD FORD, INC.,

Plaintiff-Appellee,

v

CITIZENS BANK and CITIZENS BANKING
CORPORATION,

Defendants-Appellants,

and

LAURA HANEY, GARY HANEY, LYNN
CRAPO, DEBORAH VAN DEVENTER,
FREELAND STATE BANK, and
CHRISTOPHER FINK,

Defendants.

MCDONALD FORD, INC.,

Plaintiff-Appellee,

v

CITIZENS BANK and CITIZENS BANKING
CORPORATION,

Defendants-Appellants.

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

UNPUBLISHED
September 27, 2011

No. 296814
Saginaw Circuit Court
LC No. 06-059624-CZ

No. 299324
Saginaw Circuit Court
LC No. 06-059624-CZ

In Docket No. 296814, defendants Citizens Bank and Citizens Banking Corporation¹ appeal by right from a judgment for plaintiff. In Docket No. 299324, defendants appeal by leave granted from an order denying their motion to vacate an arbitration award. This Court consolidated the appeals. We affirm.

Plaintiff asserted that it sustained significant damages due to Citizens Bank's failure to enforce an account requirement that plaintiff's checks bear two signatures in order to be honored by the bank. Plaintiff asserted that one of its employees used one-signature checks to steal *other* monies from plaintiff. Plaintiff argued that the employee could not have implemented her embezzlement scheme without Citizens Bank's complicity in paying one-signature checks that were not authorized. The parties agreed to submit the dispute to arbitration pursuant to an arbitration agreement.

The three arbitrator panel, with one dissent, entered an award in favor of plaintiff in the amount of \$1,652,102. Citizens Bank objected to a proposed judgment and moved to vacate the arbitration award. It argued that the arbitrators were led to the wrong conclusion through an error of law and that the panel did not conform to the parties' arbitration agreement because the "neutral" arbitrator did not comply with MCR 2.003. The trial court entered a judgment in favor of plaintiff and denied Citizens Bank's motion.

On appeal, Citizens Bank argues that the trial court erred in denying its motion to vacate the arbitration award. We disagree. We review *de novo* a trial court's decision to enforce, vacate, or modify an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 132; 596 NW2d 208 (1999). Therefore, judicial review of arbitration awards is strictly limited by statute and court rule. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). If, as here, an agreement to arbitrate provides that judgment may be entered on the arbitration award, then it is considered statutory arbitration. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements. MCR 3.602(J)(2) provides that a trial court may only vacate an arbitration award if one of the following occurs:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or

¹ Although a party to this appeal, Citizens Banking Corporation did not file a brief on appeal.

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

“By narrowing the grounds upon which an arbitration decision may be invaded, the court rules preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution.” *Gordon Sel-Way, Inc.*, 438 Mich at 495.

There are two ways a reviewing court can find that an arbitrator exceeded his powers, requiring vacation of an arbitration award. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). Pertinent here is whether the arbitrators acted in contravention of controlling principles of law. An arbitration award will be vacated because an arbitrator exceeded his powers through an error of law when it “‘clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through error of law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made.’” *Saveski*, 261 Mich App at 555, quoting *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982), quoting *Howe v Patrons’ Mut Fire Ins Co of Mich*, 216 Mich 560, 570; 185 NW 864 (1921). This standard precludes the trial court from review of the arbitration award on the basis that it was against the great weight of the evidence or was not supported by substantial evidence. *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986). Indeed, our Supreme Court has stated that “[i]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable.” *Gavin*, 416 Mich at 429. In addition, this Court has repeatedly emphasized that it must carefully evaluate claims of arbitrator error to ensure that they are not used as a ruse to induce this Court to review the merits of the arbitrator’s decision. See, e.g., *Washington v Washington*, 283 Mich App 667, 675; 770 NW2d 908 (2009); see also *Gordon Sel-Way, Inc.*, 438 Mich at 497. (“[C]ourts may not substitute their judgment for that of the arbitrators . . .”). Vacation of an arbitrator’s award must be based on an obvious “facial” error. *Gordon Sel-Way, Inc.*, 438 Mich at 497. “[A] trial court may not hunt for errors in an arbitrator’s explanation of how it determined who is liable under the arbitrated contract, and who owes what damages to whom.” *Saveski*, 261 Mich App at 558. Failing to limit review in this fashion “would allow a dissatisfied court to delve deeper and deeper into an arbitrator’s factual and legal support until it finally unearthed a perceived error that could justify the court’s desired outcome.” *Id.*

Citizens Bank argues that, although the award does not specify that it includes consequential damages, it is apparent from the amount of the award and the evidence presented that the award must consist entirely of consequential damages. Citizens Bank then argues that, because it would have been an error of law to award consequential damages under the facts of this case, the award contains a facial error.

Consequential damages may be awarded in the event of bad faith, MCL 440.4103(5), *or* if provided by other rule of law, MCL 440.1106(1).² Under general contract principles (i.e., “other rule of law”), damages “that arise naturally from the breach” are always recoverable, and consequential damages are appropriate if they “can *reasonably* be said to have been in contemplation of the parties at the time the contract was made.” *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994) (emphasis in original; quotations and citations omitted).

There is no record of the arbitration proceedings or written decision. The arbitrators may have found that the damages were reasonably in contemplation of the parties at the time their contract was made. The arbitrators may have found that Citizens Bank acted in bad faith. The arbitrators may have found that the damages arose naturally from the breach and were, therefore, direct and not consequential damages. Alternatively, the arbitrators may have had a different reason. It is impossible to determine the basis for the arbitrators’ decision and, therefore, impossible to determine whether the arbitrators awarded consequential damages through error of law.³

² We reject defendant’s argument that these two statutes are in conflict and that bad faith is always required. MCL 440.1106 contains a general prohibition against consequential damages “except as specifically provided in this act or by other rule of law.” Thus, consequential damages are appropriate when provided by the act. MCL 440.4103(5) provides one such instance, a showing of bad faith, where consequential damages are specifically provided for by the act.

³ Citizens Bank suggests this Court remand to the arbitrators for clarification of the award. However, the parties agreed that no stenographic record would be made of the arbitration hearing. In *Gavin*, the Court stated:

The scope of judicial review of an arbitration award is necessarily dictated in large measure by the procedural form the arbitration proceedings take. Reviewing courts can only act upon a written record. There is no requirement that a verbatim record be made of private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required. Thus, from the perspective of the record alone, a reviewing court’s ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record. [*Gavin*, 416 Mich at 428-429].

Expanding this Court’s review of the case to include the substance of the arbitrators’ deliberations, mental impressions, and factual conclusions, would run contrary to our Supreme Court’s statement, *id.* at 429, that “[i]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable.” See also *Saveski*, 261

Even if the award includes consequential damages that resulted from an error of law, it does not clearly appear on the face of the award that the arbitrators, through error of law, were led to the wrong conclusion, and that, but for that error, a substantially different award must have been made. *Saveski*, 261 Mich App at 555. The arbitration award in the instant case was very simple. It stated, in its entirety:

This matter, having been submitted to Arbitration in accordance with the Agreement of the parties, the Arbitrators find in favor of Plaintiff in the amount of \$1,652,102. This award is inclusive of all costs, interest and attorney fees.

Given that this award contains no information regarding the legal basis for the decision, it is impossible to conclude, from the face of the award, that the arbitrators made an error of law. Speculation into the basis for the decision in search of a legal error underlying the award is not permitted. See *Gordon Sel-Way, Inc*, 438 Mich at 497; *Gavin*, 416 Mich at 429; *Saveski*, 261 Mich App at 558.

Finally, we note that Citizens Bank had previously argued the issue regarding consequential damages before the trial court at a motion for summary disposition and the trial court determined that the question was for the fact finder. Pursuant to the express language of the arbitration agreement, the parties agreed to be bound by the pre-arbitration rulings of the trial court. Consequently, Citizens Bank expressly agreed to be bound by the court's determination that the fact finder had to resolve the issue of consequential damages, placing that issue squarely before the arbitrators.

Citizens Bank also argues that the trial court erred in denying its motion because the panel did not conform to the parties' arbitration agreement. We disagree. Pursuant to the parties' arbitration agreement, the trial court appointed a third arbitrator when the parties were unable to agree upon one. The parties' arbitration agreement stated that "[n]o arbitrator may serve if that person . . . would be disqualified as a judge pursuant to the reasons stated in MCR 2.003." Citizens Bank argues that the appointed arbitrator could "not impartially hear [the] case" because he was listed under the "plaintiff" category on the ADR Case Evaluator list for Saginaw County.

"[T]he partiality or bias which will overturn an arbitration award must be certain and direct and not remote, uncertain or speculative." *Kaufman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982). The mere fact that the arbitrator's name was on the list is wholly insufficient to demonstrate bias. If Citizens Bank's argument is taken to its logical conclusion, every evaluator on the list under the plaintiff or defendant category would be disqualified. Furthermore, even if this were a proper basis to challenge an arbitrator, the time for such a challenge was prior to the arbitration, when the trial court appointed the arbitrator. Having failed to challenge the appointment of the arbitrator at that time, Citizens Bank implicitly accepted the arbitrator as acceptable for the arbitration, thereby waiving any right to challenge on this basis.

Mich App at 558 (holding that the trial court erred when it ordered an expansion of the record rather than reviewing the award provided).

Ultimately, however, given the absence of any evidence of actual bias, the trial court did not err in denying Citizens Bank's motion to vacate the award on this basis.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray